No. 76-1143

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS
v.
BARLOW'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLANTS

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. A) is reported at 424 F. Supp. 437.

JURISDICTION

The judgment of the district court declaring Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), unconstitutional and enjoining the Secretary from acting pursuant to that Section was entered on December 30, 1976 (J.S. App. B). A notice of appeal to this

Court (J.S. App. C) was filed on January 4, 1977, and the appeal was docketed on February 17, 1977. The Court noted probable jurisdiction on April 18, 1977.

The jurisdiction of this Court is conferred by 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of any court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party. See *Fleming* v. *Rhodes,* 331 U.S. 100, 102–103; *United States* v. *Christian Echoes Ministry,* 404 U.S. 561, 563; *McLucas* v. *DeChamplain,* 421 U.S. 21, 23. The jurisdiction of this Court also rests upon 28 U.S.C. 1253, which authorizes an appeal to this Court from an injunctive order of a three-judge district court when such order rests upon the merits of a constitutional claim. See *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 804.[1]

QUESTIONS PRESENTED

1. Whether the inspection provisions of the Occupational Safety and Health Act, 29 U.S.C. 657(a), and their implementing regulations, violate the Fourth Amendment guarantee against unreasonable searches and seizures, insofar as they authorize representatives of the Secretary of Labor "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner" to conduct warrantless inspections of the portions of commercial premises routinely occupied by an employer's work force.

[1] Because the action was commenced on January 6, 1976, the three-judge district court had jurisdiction to consider appellee's constitutional claims. See Section 7 of Pub. L. 94–381, 90 Stat. 1119, 1120.

2. Whether, if a warrant is required, the district court should have upheld the constitutionality of the statute by interpreting it to meet the requirements of the Fourth Amendment, instead of holding the statute unconstitutional and enjoining its enforcement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), provides:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable

manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

STATEMENT

A. THE STATUTE

The Occupational Safety and Health Act of 1970 (OSHA), 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651; *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* No. 75–746, decided March 23, 1977, slip op. 1–3; *National Realty and Construction Co., Inc.* v. *Occupational Safety and Health Review Commission,* 489 F.2d 1257, 1260–1261 (C.A.D.C.).[2] To this end, the Act creates a federal statutory duty to avoid maintaining unsafe or unhealthy working conditions applicable to any non-governmental employer whose business affects commerce. 29 U.S.C. 654(a)(1) and (2), 652(5).

The Act is enforced by the Secretary of Labor through a self-contained administrative mechanism

[2] The need for the Act is explained in S. Rep. No. 91–1282, 91st Cong., 2d Sess. 2–4 (1970); Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. ("Leg. Hist.") 142–144 (1971):

"The problem of assuring safe and healthful workplaces • • • ranks in importance with any that engages the national attention today.

"• • • 14,500 persons are killed annually as a result of industrial accidents; • • • during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes.

"• • • [And] the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.

• • • • •

"• • • Substantial numbers [of workers], even today, fall victim to ancient industrial poisons such as lead and mercury. • • • Other materials long in industrial use are only now being discovered to have toxic effects. In addition, technological advances • • • have brought numerous new hazards to the workplace. Carcinogenic chemicals, lasers, ultrasonic energy, beryllium metal, epoxy resins, pesticides • • • all presentincipient threats • • •.

"In 1966–67 the Surgeon General • • • found that 65 percent of [142,000 sampled workers] were potentially exposed to harmful physical agents • • • or to toxic materials • • • and found that only 25 percent • • • were adequately [protected by existing controls].

• • • • •

"• • • As many as 3.5 million workers are exposed to some extent to [deadly] asbestos fibers • • •.

"In sum, the chemical and physical hazards which characterize modern industry are not the problem of • • • a single industry, nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern."

The House Report (H.R. Rep. No. 91–1291, 91st Cong., 2d Sess. 14 (1970), Leg. Hist. 844) describes occupational health and safety as "the most crucial [issue] in the whole environmental question," and notes that "[t]he on-the-job health and safety crisis is the worst problem confronting [over 80 million] American workers."

which provides for speedy, expert and uniform resolution of contested cases by an independent Review Commission, subject to the usual appellate review. 29 U.S.C. 651(2), (3) and (10), 658–661, 666(i). See generally, *National Realty and Construction Co. Inc.* v. *Occupational Safety and Health Review Commission, supra,* 489 F.2d at 1261–1264; *Brennan* v. *Winters Battery Mfg. Co.,* 531 F. 2d 317 (C.A. 6), certiorari denied *sub nom. Winters Battery Mfg. Co.* v. *Usery,* 425 U.S. 991; *Brennan* v. *Occupational Safety and Health Review Commission* (*Gordon Co.*), 492 F. 2d 1027, 1030 (C.A. 2).

The Secretary's inspectors are authorized by the Act to conduct safety and health inspections at places of employment. 29 U.S.C. 657(a). If, upon inspection, the Secretary has cause to believe that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and (in his discretion) proposing a civil monetary penalty. 29 U.S.C. 658, 659.[3] If the employer does not contest the citation within

[3] The amount of the proposed penalty "if any" (29 U.S.C. 659(a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (*ibid.*; see 29 U.S.C. 666(i) and (j)). The prospect of such penalties is designed to promote voluntary compliance by employers before any inspector arrives. 29 U.S.C. 651(1); see Leg. Hist. 463–464, 470 (Sen. Javits), 471–472 (Sen. Dominick), 853; *Brennan* v. *Occupational Safety and Health Review Commission* (*Interstate Glass Co.*) 487 F.2d 438, 441, 443 (C.A. 8). Cf. *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 401. Such proposed penalties may range up to $1,000 for serious violations, and to a maximum of $10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)–(c) and (j). See, *e.g.*, *Intercounty Construction Co.* v. *Occupational Safety and Health Review Commission*, 522 F. 2d 777 (C.A. 4), certiorari denied, 423 U.S. 1072; *Messina Construction Corp.* v. *Occupational Safety and Health Review Commission*, 505 F. 2d 701 (C.A. 1).

The Secretary may also propose a civil penalty of not more than $1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final agency order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Department of Justice for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a $10,000 fine. 29 U.S.C. 666(e). However, since the Act's April 1971 effective date, approximately 400,000 inspections have resulted in only 5 criminal prosecutions.

15 working days, it becomes a final abatement order and is "not subject to review by any court or agency." 29 U.S.C. 659(a). Cases in which violations are contested are tried before Occupational Safety and Health Review Commission administrative law judges, subject to review by the Commission and the courts of appeals. 29 U.S.C. 659(c), 660, 661(i).

The inspections must be made "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner * * *." 29 U.S.C. 657(a)(2). Selection of the workplaces to be inspected is made by departmental area directors, and not by the inspectors.[4] Upon pres-

[4] See U.S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, chapter 4, 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976).

entation of his credentials to the employer or agent in charge of the premises,[5] the inspector is entitled to entry "without delay" to inspect for occupational safety and health hazards "where work is performed by an employee of an employer." 29 U.S.C. 657(a). Advance notice of the inspection is prohibited and is subject to criminal sanctions. 29 U.S.C. 666(f), 651(10). The employer is entitled to accompany the inspector during his tour of the relevant premises, and may raise privacy or other objections to the conduct of the inspection. 29 U.S.C. 657(e); see 29 C.F.R. 1903.4, 1903.7(e), 1903.8.[6]

The statute provides no sanctions for refusals to permit inspections (but see p. 34, note 12, *infra*). In implementing the statute, the Secretary has promulgated a regulation requiring the inspector to seek compulsory process authorizing entry if the employer refuses to consent to the inspection (29 C.F.R. 1903.4).

[5] These credentials bear a photograph of the inspector and identify him by name and area office. The credentials also paraphrase and cite the statutory authority to inspect. See *Usery* v. *Godfrey Brake and Supply Service, Inc.*, 545 F.2d 52, 53–55 (C.A. 8). Inspectors may offer toll-free verifying calls to their area offices if these credentials do not convince employers of the propriety of the inspection (*ibid.*). Agency regulations also require that the inspector explain the nature, purpose and scope of the proposed inspection, avoid unreasonable disruption of business operations or hazardous conduct, and obey the employer's normal work rules. 29 C.F.R. 1903.7(a), (c), and (d).

[6] Trade secrets of the employer are explicitly protected. 29 U.S.C. 664–665; 29 C.F.R. 1903.9.

B. THE FACTS OF THIS CASE AND THE PROCEEDINGS BELOW

Appellee Barlow's, Inc. operates an electrical, plumbing, and heating and air-conditioning installation business in Pocatello, Idaho. At 11:00 a.m. on September 11, 1975, an OSHA inspector arrived at Barlow's to make a routine inspection of its work areas,[7] presented his credentials, and explained his mission to Ferrol G. "Bill" Barlow, the company's president, who denied entry to the inspector because he did not have a search warrant (A. 16–17). After notice and hearing, the Secretary obtained a district court order on December 30, 1975, which authorized the entry for inspection purposes (J.S. App. A 1a–2a).

On January 5, 1976, the inspector returned to Barlow's and requested permission to inspect based on the district court's order. Permission was again denied, and the next day appellee filed a complaint in the United States District Court for the District of Idaho, alleging that 29 U.S.C. 657(a) is inconsistent with the

[7] The inspection was a "general schedule" investigation—it was not based on any employee complaint (29 U.S.C. 657(f)), history of past violations (29 U.S.C. 659(b), 666(d)), or other reason to believe a violation was occurring at that particular location (J.S. App. A 2a). Such general inspections, now called Regional Programmed Inspections, are carried out in accordance with criteria based upon accident experience and the number of employees exposed in particular industries. U.S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, *supra*, 1 CCH Employment Safety and Health Guide ¶ 4327.2 (1976).

Fourth Amendment and seeking temporary and permanent injunctions against OSHA inspections. On January 15, 1976, a single judge denied Barlow's requests for preliminary relief (J.S. App. A 3a).

A three-judge court was thereafter convened (J.S. App. 3a). Relying on *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, the district court held that the inspection provisions of 29 U.S.C. 657(a), which authorize warrantless inspections of the business establishments covered by the Act, "are unconstitutional as being violative of the Fourth Amendment" (J.S. App. A 10a). The district court rejected the applicability of this Court's subsequent decisions in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, and *United States* v. *Biswell,* 406 U.S. 311, on the ground that those cases respectively "dealt with an 'industry long subject to close supervision and inspection' (*Colonnade,* 397 U.S. at 77), and a pervasively regulated business (*Biswell,* 406 U.S. at 316)" (J.S. App. A 7a). In so ruling, the court followed the decision of another three-judge district court in *Brennan* v. *Gibson's Products Inc. of Plano,* 407 F. Supp. 154 (E.D. Tex.), appeal pending, C.A. 5, No. 76–1526 (J.S. App. A 7a–9a).

However, unlike the court in *Gibson's Products,* the court below concluded that Section 8(a) of OSHA could not be construed to require "that a warrant be obtained before any inspection is undertaken" (J.S. App. A 10a). In this respect, the court stated that

"Congress was able * * * to employ language declaring that a warrant must first be obtained * * * [but] did not do so and we refuse to accept that duty" (J.S. App. A 10a). The court therefore held OSHA to be unconstitutional and permanently enjoined the Secretary from conducting safety inspections pursuant to 29 U.S.C. 657(a), and specifically from inspecting appellee's premises (*ibid.*).

On February 3, 1977, Mr. Justice Rehnquist stayed the district court's order except as it applied to appellee Barlow's (A. 38–41) on the ground that "the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court" (A. 39).

SUMMARY OF ARGUMENT

I.

1. The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.,* arose out of a congressional finding that "the common law and other existing remedies for work injuries resulting from unsafe working conditions * * * [were] inadequate to protect the Nation's working men and women." *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* No. 75–746, decided March 23, 1977, slip op. 18. At issue in this case is the constitutionality of the inspection provisions which are at the heart of the enforcement of the safety and health standards established under the Act. In order to insure compliance, Congress has authorized representatives of the Secre-

tary of Labor, "upon presenting appropriate credentials" "to enter without delay and at reasonable times any factory * * * [etc.] * * * to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions" (29 U.S.C. 657(a)).

The language of the inspection provisions and the pertinent legislative history establish that Congress intended to grant the Secretary broad power to enter whatever business establishments he might choose to inspect and that the inspections were to be carried out expeditiously with no advance notice. Thus, the statute authorizes the Secretary to "enter without delay * * * *any* factory [etc.]" (29 U.S.C. 657(a)) (emphasis supplied) without any necessity to show cause to suspect that a violation might exist. Since an employer often can easily conceal hazardous working conditions, Congress provided criminal sanctions against giving advance notice of any inspection. In Congress' view, the power to conduct prompt, unannounced inspections would promote compliance with the Act despite the Secretary's limited personnel resources because employers would be motivated to maintain safe and healthful working conditions against the everpresent possibility of an inspection.

2. The decision of the three-judge district court that the Secretary cannot conduct an inspection without a search warrant frustrates the clearly articulated intent of Congress and has no valid foundation in the Fourth Amendment decisions of this Court. "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States,* 357 U.S. 493, 498. Thus, whether a search or an inspection without a warrant is constitutionally unreasonable depends upon a determination whether the privacy interest at stake is of such magnitude and the authorized entry so significant an encroachment on that interest that the interposition of a neutral and detached magistrate should be required in the absence of exigent circumstances to approve the search or the inspection.

Here, there is no significant privacy interest at stake that calls for the imposition of the warrant requirement. The areas and equipment within appellee's workplace that the Secretary seeks to inspect are routinely occupied and used by appellee's employees. This critical fact serves to diminish appellee's claims of privacy with respect to the work areas of his business premises, especially *vis-a-vis* the inspectors who are charged with the responsibility of insuring the health and safety of the employees whom appellee has assigned to such areas. Indeed, the Secretary's specifically focused inspection of an employer's workplace during "regular working hours" when the employees are present (and would be free to report violations of the Act) can hardly be said to intrude upon the employer's right of privacy in the same degree as would a search of his home, office, or person. Thus, in important respects, in the case of an inspection

under the Occupational Safety and Health Act, the invasion of privacy "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865.

3. This Court's decisions in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, do not control this case. The privacy interests in *Camara* and *See* that resulted in the imposition of a warrant requirement for local housing and fire code inspections were both of a considerably greater magnitude than appellee's claim of privacy in this case. *Camara* involved a personal residence, necessarily implicating a core privacy interest. And while *See* involved a commercial warehouse, "[t]he warehouse * * * [was] maintained as locked premises and * * * [was] inaccessible to anyone except the defendant" (408 P. 2d at 263). Although *See* held Fourth Amendment protections applicable to commercial premises, that decision did not preclude the use of warrantless searches of such premises "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope * * * [pursuant to] the authority of a valid statute." *United States* v. *Biswell,* 406 U.S. 311, 315.

Three considerations that were significant to the Court's decisions in *Camara* and *See* are absent in this case. First, the Occupational Safety and Health Act does not provide any sanction for simple refusal to consent to an inspection. Second, a magistrate would provide no meaningful safeguard in the present

context for an employer's privacy interests because the highly detailed provisions of the Act limit the inspector's discretion to examination of the work areas in order to determine the existence of occupational hazards. There are accordingly no questions of fact or discretion with respect to which the antecedent evaluation of a magistrate would be required or even helpful to safeguard the privacy interests that are the touchstone of the Fourth Amendment.

Finally, unlike the situation in *Camara* and *See,* a warrant requirement would significantly impede the effectuation of the purpose of the Occupational Safety and Health Act. This would be the case whether the warrant need be sought only after access is refused or prior to any attempt to inspect. If an employer could refuse to permit an inspection without a warrant, his refusal would provide him with the functional equivalent of advance notice and he could often temporarily conceal occupational hazards. Moreover, requiring the Secretary to obtain a warrant in advance of each inspection would impede enforcement of the Act by imposing needless additional strain on the Secretary's limited resources to cover nearly five million workplaces with only 1,300 inspectors.

4. This case is governed by this Court's analysis in *United States* v. *Biswell, supra.* In upholding warrantless inspections as part of a comprehensive federal gun control program, the decision in *Biswell* reflects the Court's recognition that the gun inspection powers at issue were necessary to implement a

regulatory system in which important societal interests were at stake. 406 U.S. at 315–316. Congress has similarly determined that the health and safety of the Nation's workers is of great public importance and that unannounced inspections are essential to the enforceability of the statute. Here, as in *Biswell,* "the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible" (406 U.S. at 316). Where, as here, the areas to be inspected are comprehensively regulated, inspectors "kn[o]w with certainty" that those areas contain regulated working conditions and are "within the proper scope of official scrutiny" (*Almeida-Sanchez* v. *United States,* 413 U.S. 266, 271), and employers are "not left to wonder about the purposes of the inspector or the limits of his task" (*United States* v. *Biswell, supra,* 406 U.S. at 316), no warrant is required.

II.

Even if the Court should conclude that the Fourth Amendment precludes warrantless safety inspections of comprehensively regulated working areas, the district court erred in declaring 29 U.S.C. 657(a) "unconstitutional and void" (J.S. App. B 11a) and enjoining its enforcement. It should instead have followed this Court's rule that "under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment," *Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 272, and interpreted the statute to meet Fourth Amendment requirements.

ARGUMENT

I. THE SECRETARY'S WARRANTLESS INSPECTION DURING REGULAR BUSINESS HOURS OF THE PORTIONS OF COMMERCIAL PREMISES ROUTINELY OCCUPIED BY AN EMPLOYER'S WORK FORCE, PURSUANT TO HIS AUTHORITY UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT, DOES NOT VIOLATE THE FOURTH AMENDMENT

This case presents the second constitutional challenge in this Court to a major federal statute designed to guarantee safe and healthful working conditions to the Nation's workers in businesses affecting interstate commerce. Last Term in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission,* No. 75–746, decided March 23, 1977, the Court unanimously held that the Seventh Amendment did not prohibit Congress from creating a new cause of action in the government for civil penalties for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.,* and assigning the adjudication of such violations to an administrative agency where there is no jury trial. As the Court stated, "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation nor prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field" (slip op. 12).

In so holding, the Court recognized that the genesis of the Act was the congressional finding that "the common law and other existing remedies for work injuries resulting from unsafe working conditions * * * [were] inadequate to protect the Nation's working men and women" (slip op. 18). See 29 U.S.C. 651. The Act therefore authorizes the Secretary of Labor "to set mandatory occupational safety and health standards" (29 U.S.C. 651(3), 655) and creates a new statutory duty for employers to furnish employment and a place of employment that are "free from recognized hazards" and to "comply with occupational safety and health standards promulgated" by the Secretary (29 U.S.C. 654(a)(1) and (2)).

The issue here is the constitutionality of the inspection provisions which are at the heart of the enforcement of the safety and health standards established under the Act. In order to insure compliance with the statutory standards, Congress authorized representatives of the Secretary of Labor to conduct reasonable safety and health inspections. Pursuant to 29 U.S.C. 657(a), the OSHA inspectors, upon presentation of their identifying credentials, are empowered to enter places of employment "without delay and at reasonable times" for the purpose of inspecting "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner" such places and all pertinent conditions. If a violation is discovered, the Secretary issues a citation to the employer fixing a reasonable

time for its abatement and, in his discretion, proposing a civil monetary penalty. See 29 U.S.C. 658, 659.

There is no statutory requirement that the Secretary's representatives obtain a search warrant in order to inspect an employer's workplace. The question presented is whether the warrantless inspections authorized by the statute are compatible with the Fourth Amendment's guarantee against "unreasonable searches and seizures." It is our submission that the safeguards contained in the Act for the conduct of such inspections are sufficient to meet Fourth Amendment requirements in light of the limited nature of an employer's privacy interest in the portions of his premises routinely occupied by his employees. As we shall show, that interest is not sufficient to override a specific congressional authorization, made to further comprehensive regulation of employees' working conditions, where the possibilities of abuse and the threat to privacy are not of impressive dimensions.

A. The Act authorizes "reasonable" warrantless inspections in order to effectuate the congressional purpose of preventing an employer from concealing safety and health hazards

1. The language of the Act establishes beyond question that Congress intended to grant the Secretary broad power to enter whatever covered business establishments he might choose to inspect and that the inspections be carried out expeditiously with no ad-

vance notice. The inspection provision authorizes the Secretary to "enter without delay * * * *any* factory * * *" (29 U.S.C. 657(a); emphasis supplied) without any necessity to show cause to suspect that a violation might exist.[8] Furthermore, the Act's provisions show that, in view of the ease with which hazardous working conditions might be temporarily concealed or ameliorated, Congress regarded surprise as a critical element of the Secretary's authority under the Act to conduct routine spot inspections. The statutory preamble specifically recognizes that, as an important aspect of "an effective enforcement program," the Act contains "a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition" (29 U.S.C. 651(10)).[9]

[8] See also 29 U.S.C. 667(c)(3), which specifies that state plans submitted to the Secretary establish "a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in * * * [29 U.S.C. 657(a)]."

The Act also provides a procedure for an employee to file a complaint with the Secretary alleging a violation within his place of employment. If the Secretary concludes that there are reasonable grounds to believe that the alleged violation exists, "he shall make a special inspection * * * as soon as practicable, to determine if such violation or danger exists" (29 U.S.C. 657(f)). See also 29 C.F.R. 1903.11.

[9] The criminal penalty for giving such advance notice of an inspection is a fine of $1,000, a maximum prison term of six months, or both (29 U.S.C. 666(f)).

There are four exceptions to the prohibition against giving advance notice of inspection: (1) in cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible; (2) where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection; (3) where necessary to assure the presence of representatives of the employer and employees needed to aid in the inspection; and (4) where the Area Director determines that advance notice would enhance the probability of an effective and thorough inspection. See 29 C.F.R. 1903.6.

The congressional directive that inspections be conducted without delay and the prohibition against giving advance notice of an inspection are designed to prevent an employer from concealing violations from the inspector's scrutiny. As the Eighth Circuit stated in *Usery* v. *Godfrey Brake and Supply Service, supra,* 545 F. 2d at 55: "[P]rompt, unannounced inspections are an important element in enforcement of this Act. * * * Undoubtedly the provision for entry 'without delay,' like the advance notice provision, prevents subversion of the program and encourages consistent compliance."

The statutory language is reinforced by the pertinent legislative history. The Senate Committee on Labor and Public Welfare Report (S. Rep. No. 91–1282, 91st Cong., 2d Sess. 11 (1970)) stated that "[i]n order to carry out an effective national occupational safety and health program it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment." Accord: H.R. Rep. No. 91–1291, 91st Cong., 2d Sess. 22 (1970). Moreover, during the House floor debates, Representative Steiger, the co-sponsor of the Act, explained: "In general, it is our intent * * *

that the Federal inspector should gain entry to a business or workplace with an absolute minimum of delay." The inspector was not to be compelled "to wait an inordinate amount of time" or to "give up and go back to his office." Leg. Hist. 1076. Finally, the House Committee on Education and Labor emphasized the crucial element of surprise in the execution of the inspections, stating that (H.R. Rep. No. 91-1291, *supra,* at 26-27) "[e]ssential to the effective enforcement of this Act is the premise that employers will not be forewarned of inspections of their plants. Experience under the Walsh-Healey Act has indicated that the practice of advance notice to an employer has been a prime cause of the breakdown in that statute's enforcement provisions."

2. The decision of the district court that an OSHA inspection cannot be conducted without a search warrant would thus frustrate the clearly articulated intent of Congress to provide for flexible representative inspections "without delay" of the working conditions of the Nation's employees. Nothing in the language of the Act or in its legislative history in any way suggests that the Secretary's inspectors are required to obtain a search warrant as a prerequisite to gaining entry to the portion of a regulated business establishment occupied by the employer's work force.[10]

[10] Every bill that was introduced in either house granted inspection powers to the Secretary that were cast in terms similar to those set forth in Section 8(a) of the Act. See, *e.g.*, S. 2193, 91st Cong., 1st Sess., Sec. 5(a) (1969), Leg. Hist. 10-11 (Williams bill); S. 2788, 91st Cong., 1st Sess., Sec. 6(a) (1969), Leg. Hist. 46 (Javits bill); S. 4404, 91st Cong., 2d Sess., Sec. 9(a) (1970), Leg. Hist. 92 (Dominick bill); H.R. 3809, 91st Cong., 1st Sess., Sec. 5(a) (1969), Leg. Hist. 638-639 (O'Hara bill); H.R. 13373, 91st Cong., 1st Sess., Sec. 6(a) (1969), Leg. Hist. 694 (Ayres bill).

Indeed, the district court acknowledged as much in stating that "[c]ertainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations" (J.S. App. A 10a).

Moreover, there can be no doubt that the OSHA inspector who sought entry into appellee's business premises fully complied with the statutory standards governing inspections and the Secretary's regulations promulgated thereunder. He arrived at appellee's place of business at 11 a.m.—"during regular working hours" (29 U.S.C. 657(a)(2))—and presented his credentials which identified him as a representative of the Secretary (29 U.S.C. 657(a)). He then requested permission from appellee's president to enter the company's worksite, and advised him of the pertinent statutory authority for such inspection (29 C.F.R. 1903.7(a), (c), and (d)). Thus, the sole basis for appellee's denial of permission to enter by the OSHA inspector was that the inspector "did not possess a Warrant and that it was * * * [appellee's] right as a citizen to due process and that a Warrant was necessary before he would permit * * * [the inspector] to make the inspection" (A. 17). We submit that the district court's acceptance of appellee's constitutional claim reflects a serious misapprehension of the Fourth Amendment jurisprudence of this Court.

B. The fundamental policy of protection of privacy interests embodied in the Fourth Amendment would not be meaningfully advanced by adoption of a warrant requirement for the Secretary's routine inspection of work areas of commercial premises under the Occupational Safety and Health Act

The Fourth Amendment imposes two separate, although related, limitations upon searches and seizures. The first clause of the Amendment "is general and forbids every search that is unreasonable." *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 357. The second clause places a number of restrictions upon the issuance and character of warrants. Although the Amendment itself does not indicate the interrelation between the two clauses, the Court has stated on a number of occasions that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U.S. 523, 528–529. See also *Cady* v. *Dombrowski,* 413 U.S. 433, 439; *United States* v. *United States District Court,* 407 U.S. 297, 314–321; *Coolidge* v. *New Hampshire,* 403 U.S. 443, 454–455; *Katz* v. *United States,* 389 U.S. 347, 357. It was on this statement in *Camara* that the district court relied in holding that warantless OSHA inspections by representatives of the Secretary are barred by the Fourth Amendment (see J.S. App. A 5a–6a).

Contrary to the district court's conclusion, this case is not controlled by *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541.

While the Court applied a warrant requirement in those cases in the context of administrative inspections, their rationale does not extend to the federal regulatory statute at issue here. As we shall show, this case is governed by the analysis in the Court's subsequent decisions in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, and *United States* v. *Biswell,* 406 U.S. 311, which explained the basis of its prior rulings in *Camara* and *See* and upheld the constitutionality of properly limited warrantless inspections under closely similar federal regulatory statutes.

1. "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady* v. *Dombrowski, supra,* 413 U.S. at 439. See also *South Dakota* v. *Opperman,* 428 U.S. 364, 372–373. Whether a search or seizure is reasonable within the meaning of the Fourth Amendment depends "upon the facts and circumstances of each case" (*Cooper* v. *California,* 386 U.S. 58, 59) and "the context in which [the Fourth Amendment right] is asserted" (*Terry* v. *Ohio,* 392 U.S. 1, 9). And, as the Court explained in *Warden* v. *Hayden,* 387 U.S. 294, 305–306, the primary object of the Fourth Amendment is the protection of privacy rather than proprietary rights. "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States,* 357 U.S. 493, 498. See also *Schmerber* v. *California,* 384 U.S. 757,

769–770; *Katz* v. *United States,* 389 U.S. 347, 350; *United States* v. *Dionisio,* 410 U.S. 1, 14–15. But not all governmental intrusions are of equal magnitude or demand the identical degree of protection. Rather, each such intrusion must be tested by its justification and by the significance of the privacy interests involved. *South Dakota* v. *Opperman, supra,* 428 U.S. at 377–378 (Powell, J., concurring).

Thus, whether a search or an inspection without a warrant is *per se* unreasonable (in the absence of exigent circumstances) depends upon a determination whether the privacy interest at stake is of such magnitude that the interposition of a neutral and detached magistrate should be required to authorize the search or the inspection. As the Court has stated, "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Court, supra,* 387 U.S. at 536–537.

Accordingly, while the Court has held that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of [a man's] home" (*McDonald* v. *United States,* 335 U.S. 451, 455–456), it has sustained the validity of warrantless searches or seizures in other contexts where core privacy interests are not similarly implicated. For example, the Court has expressly declined to impose a warrant requirement on otherwise reasonable searches of automobiles. See, *e.g., Carroll* v.

United States, 267 U.S. 132, 149; *Chambers* v. *Maroney,* 399 U.S. 42, 49; *Cardwell* v. *Lewis,* 417 U.S. 583, 589–591. The Court has recognized that its disparate treatment of automobiles and personal residences no longer rests narrowly upon the fact that vehicles are mobile and dwellings are not. *Cady* v. *Dombrowski, supra,* 413 U.S. at 441–442. Rather, the distinction proceeds from the premise that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis, supra,* 417 U.S. at 590. See also *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 565; *United States* v. *Ortiz,* 422 U.S. 891, 896 n. 2; *South Dakota* v. *Opperman, supra,* 428 U.S. at 367. Cf. *United States* v. *Chadwick,* No. 75–1721, decided June 21, 1977.

As in the cases involving automobile searches, the limited statutory inspection program at issue here does not implicate significant privacy interests calling for the imposition of the warrant requirement. We do not mean to suggest that a commercial building is the functional equivalent of an automobile for purposes of the Fourth Amendment or that the rationale of the automobile search cases is freely transferable to searches of other types of property. Indeed, the Court has included commercial premises such as a private office within the protections of the warrant requirement. See *G.M. Leasing Corp.* v. *United States,* No. 75–235, decided January 12, 1977, slip op. 14, 19;

Mancusi v. *DeForte,* 392 U.S. 364. But under the criterion of privacy that is the touchstone of the Court's Fourth Amendment decisions, not all areas within a commercial building are entitled to the same degree of constitutional protection. For example, no one would suggest that law enforcement officers would need a warrant to enter during business hours the public areas of a store that are open to customers. For, as this Court has observed, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States, supra,* 389 U.S. at 351; *United States* v. *Dionisio, supra,* 410 U.S. at 14. See also *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 78 (Burger, C.J., dissenting).

Conversely, the contents of drawers, cabinets and the like, whether they are in a private residence or in a commercial building, are generally protected against warrantless inspection by the State. Moreover, the Court has applied the warrant requirement to a search of a double-locked footlocker seized upon the arrest of the owner in a public place. The Court there viewed the owner's placing of his personal effects in such a receptacle as manifesting an expectation that the contents would remain free from public examination. *United States* v. *Chadwick, supra,* slip op. 9.

However, as was the case with the warrantless searches of the exterior of an automobile and of the glove compartment of an impounded vehicle that the Court respectively upheld in *Cardwell* v. *Lewis, supra,* and *South Dakota* v. *Opperman, supra,* there are

areas of a commercial building in which the owner does not have a significant expectation of privacy from reasonable, limited-purpose inspections during business hours. When such a limited privacy interest is at stake and when the conduct of law enforcement officers does not touch upon interests that implicate "the essential purpose of the Fourth Amendment" (*Jones* v. *United States, supra,* 357 U.S. at 498), there is no necessity to invoke the most stringent protections of the Amendment. *United States* v. *Martinez-Fuerte, supra,* 428 U.S. at 564–565. While the work areas of a conventional factory housing a legitimate business enterprise may be closed to the general public (cf. *Air Pollution Variance Board* v. *Western Alfalfa Corp,. supra,* 416 U.S. at 865), their routine occupation by the owner's employees and the frequent visits by those outside parties who deliver materials for the conduct of the enterprise effectively diminish any claim of privacy by the factory owner with respect to such areas—especially *vis-a-vis* inspectors whose mission is to insure the health and safety of the very employees whom the owner has assigned for his profit to the areas at issue. Cf. *Clarkson Construction Co.* v. *Occupational Safety and Health Review Commission,* 531 F.2d 451, 458 (C.A. 10).

Simply put, the Act guarantees to these employees that they will be able to perform their labor in a safe and healthful environment, and the employer cannot assert his ownership interest in the premises to bar the way of the inspector assigned to assure the observance of that guaranty. As the Court stated

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more than 30 years ago in rejecting an analogous "property right" claim in *Marsh* v. *Alabama*, 326 U.S. 501, 506. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 798, 802 n. 8; *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 547; *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 563; *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 521–523.

The foregoing analysis supports the reasonableness of the warrantless inspections of commercial premises authorized by the Occupational Safety and Health Act of 1970. Pursuant to the statute, the Secretary of Labor is empowered to inspect "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, and materials therein" (29 U.S.C. 657(a)(2)). Thus, the Act prescribes a regulatory inspection system that is limited in time, place and scope. Since an employer's work force routinely occupies the areas and uses the equipment that the Secretary is authorized to inspect, and since the employees (who are the Act's intended beneficiaries) may freely observe and report any violation,[11] the Secretary's inspection of those areas and

[11] Cf. *United States* v. *Miller*, 425 U.S. 435, 442 (holding that a depositor lacks a Fourth Amendment interest in bank records containing "information voluntarily conveyed [by him] to the banks and exposed to their employees in the ordinary course of business"). See also *Couch* v. *United States*, 409 U.S. 322, 335. And see, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 170 ("the consent of one who possesses common authority over premises or effects is valid as against the absent nonconsenting person with whom that authority is shared").

items during "regular working hours" when the employees are present can hardly be said to intrude upon the employer's right of privacy in the same degree as would a search of his home, office or person. Indeed, one court of appeals has characterized the violations that an OSHA officer discovered during a routine inspection—"ungrounded machines, lack of color coating on the fire extinguishers, etc.—* * * [as] in plain, obvious view." *Lake Butler Apparel Co.* v. *Secretary of Labor*, 519 F. 2d 84, 88 (C.A. 5). As that court further stated, "There was no search here of drawers or other sequestered areas. For that reason * * * [the employer] may not rely on the *Camara/See* precedent" (*ibid.*). Cf. *Bloomfield Mechanical Contracting, Inc.* v. *Occupational Safety and Health Review Commission*, 519 F. 2d 1257, 1263 (C.A. 3). Accord: *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51 (S.D. Ohio) (three-judge court) (Coal Mine Health and Safety Act of 1969). Thus, in important respects, in a routing OSHA inspection of an employer's workplace, the invasion of privacy "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, *supra*, 416 U.S. at 865.

2. The district court erred, we submit, in concluding that this Court's prior decisions involving administrative inspections require invalidation of warrantless inspections under the Occupational Safety and Health Act of 1970. In *Camara* v. *Municipal Court,* 387 U.S. 523, the Court held that the Fourth Amendment barred criminal prosecution of one who refused to permit a warrantless housing code inspection of his personal residence. The companion decision in *See* v. *City of Seattle,* 387 U.S. 541, extended this rule to a similar fire code inspection of a locked commercial warehouse not used as a residence.

To begin with, the privacy interests asserted in *Camara* and *See* that resulted in the imposition of a warrant requirement were both of a considerably higher magnitude than appellee's claim of privacy in this case. *Camara* involved a personal residence, necessarily implicating a core privacy interest. See *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 564–656. Cf. *United States* v. *Chadwick, supra.* And while *See* involved a commercial warehouse, "[t]he warehouse * * * [was] maintained as locked premises and * * * [was] inaccessible to anyone except the defendant" (408 P. 2d at 263). Although *See* held Fourth Amendment protections applicable to commercial premises, that decision did not preclude the use of warrantless searches of such premises "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope * * * [pursuant to] the authority of a valid statute." *United States* v. *Biswell, supra,* 406 U.S. at

315. Here, the OSHA inspector sought to examine during business hours only that portion of appellee's business premises that was routinely occupied by its employees in the course of the performance of their duties, for purposes of a statutorily authorized inspection that was also "carefully limited in * * * scope."

The Court's opinions in *Camara* and *See* indicate that three considerations were important to its determinations that warrants were constitutionally required in those inspection contexts. First, that "refusal to permit an inspection * * * [was] itself a crime, punishable by fine or even by jail sentence" and that "only by refusing entry and risking a criminal conviction can the occupant * * * challenge the inspector's decision to search" (387 U.S. at 531, 532). Second, the Court found that the warrant process would provide meaningful safeguards for the occupant by requiring the official to justify the need for the inspection and show that it was within the lawful limits of his authority. As the Court stated in *See,* the warrant process would insure that "the decision to enter * * * will not be the product of the unreviewed discretion of the enforcement officer in the field" (387 U.S. at 545; footnote omitted). Finally, the Court observed in *Camara* that "[i]t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement" (387 U.S. at 533). Without such a showing, the Court rejected the city's argument that the public interest justified warrantless housing code searches.

These three considerations upon which *Camara* and *See* turned are absent in this case involving warrantless inspections under a detailed federal regulatory statute. As we have pointed out *supra,* p. 8, the Occupational Safety and Health Act of 1970 does not provide any sanction for simple refusal to consent to an inspection.[12] Pursuant to 29 C.F.R. 1903.4, the Secretary "shall promptly take appropriate action, including compulsory process, if necessary" authorizing entry if the inspector is initially refused entry. Thus, under the Secretary's regulations, the inspection system established by the Act contemplates neither physical force nor criminal proceedings against a recalcitrant employer but provides for the initiation of legal process to compel compliance.[13]

Moreover, unlike the situation in *Camara* and *See,* a requirement of search warrants for the Secretary's routine "general schedule" OSHA inspections would provide no meaningful safeguard for an employer's

[12] However, Section 17(h) of OSHA amended 18 U.S.C. 1114 to include OSHA inspectors within its protection. And 18 U.S.C. 111 subjects to criminal liability one who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in [18 U.S.C. 1114] while engaged in or on account of the performance of his official duties * * *." See *United States* v. *Camp*, 541 F. 2d 737, 739 (C.A. 8).

[13] The Court has subsequently indicated that the existence of criminal penalties for refusal to permit entry to a federal liquor inspector does not demand the conclusion that a warrant is required. See *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, which we discuss at pp. 42–43, *infra.*

privacy interests in addition to those provided by the Act and regulations themselves. In *Camara,* the Court observed that "when the inspector demands entry, the occupant has no way of knowing * * * the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization" (387 U.S. at 532). In the Court's view, "[t]hese are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area" (*ibid.*).

But there is no comparable function for a magistrate to perform in an OSHA inspection. Pursuant to the Act, the Secretary is authorized only "to inspect * * * any * * * place of employment and all pertinent conditions, structures * * * therein * * *" for unsafe working conditions. The statute further confines the scope of the Secretary's inspection power to "regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner * * *" (29 U.S.C. 657 (a)(2)) and directs the inspector to present "appropriate credentials to the owner, operator, or agent in charge" (29 U.S.C. 657(a)) prior to his entry on the premises. Finally, the regulations direct the inspector to explain the nature and purpose of his visit (29 C.F.R. 1903.7).

In these circumstances, the employer cannot claim that he has "no way of knowing whether enforcement of * * * [the Act] requires inspection of his premises"

(387 U.S. at 532).[14] Moreover, since the essence of the general schedule inspection is that it is a random spot check, the factors identified in *Camara* v. *Municipal Court, supra,* 387 U.S. at 538–539, as supporting a finding of probable cause for inspection would be largely irrelevant.[15] Likewise, the Act limits the inspector's

[14] The Act requires an employer to be familiar with its detailed application to this workplace. See 29 U.S.C. 654(a), 657(e), 666(j); 29 C.F.R. 1903.7(e), Part 1904; *Ames Crane & Rental Service* v. *Dunlop*, 532 F. 2d 123 (C.A. 8); *Brennan* v. *Butler Lime & Cement Co.*, 520 F. 2d 1011, 1016–1018 (C.A. 7); *Accu-Namics, Inc.* v. *Occupational Safety and Health Review Commission*, 515 F. 2d 828, 835 (C.A. 5), certiorari denied, 425 U.S. 903. See, generally, *National Realty and Construction Co., Inc.* v. *Occupational Safety and Health Review Commission, supra*, 489 F. 2d at 1265–2167 nn. 34–38.

[15] For example, we are advised by the Department of Labor that a new plant or process is frequently more hazardous than an established industrial activity. Moreover, the "passage of time" (387 U.S. at 538) since the last inspection is not a useful criterion, especially where only a minute percentage of the Nation's workplaces has ever been inspected. See p. 40, and note 21, *infra*. Since the Secretary is directed to conduct general schedule inspections in order to establish enforcement of the Act on a representative basis, there would be no factual questions for a magistrate to resolve. Cf. S. Rep. No. 91–1282, *supra*, at 12; Leg. Hist. 152.

Probable cause for inspections based on fatality reports or employee complaints could be established by submitting to the magistrate the fatality report prepared by the employer (29 C.F.R. 1904.8) or the employee complaint, which must in any event be presented to the employer at the time of the inspection (29 U.S.C. 657(f)(1)). But the warrant procedure in these cases would provide the employer with no more information concerning the reasonableness of the inspection than he is already provided by statute and regulation. See *United States ex rel. Terraciano* v. *Montanye*, 493 F. 2d 682, 685 (C.A. 2), Certiorari denied *sub nom. Terraciano* v. *Smith*, 419 U.S. 875. Moreover, we are advised by the Department of Labor that the data derived from its information retrieval system show that random general schedule inspections result in a higher percentage of discovered violations than those triggered by complaints or fatality reports.

discretion to search to the scope necessary to identify occupational hazards and the inspector's presentation of "appropriate credentials" serves to confirm that he is acting under proper authorization.[16] Thus, the procedures established by the Act answer the critical questions of scope and authority identified by the Court in *Camara* as requiring determination by a magistrate.[17] See *United States* v. *Martinez-Fuerte, supra,* 428 U.S. at 565. There are accordingly no questions of fact or discretion in an OSHA inspection with respect to which the antecedent evaluation of a magistrate would be required or even helpful to safeguard the privacy interests that are the touchstone of the Fourth Amendment. See *South Dakota* v. *Opperman, supra,* 428 U.S. at 382–383 (Powell, J., concurring). Cf. *United States* v. *Chadwick, supra,* slip op. 7–8; *G.M. Leasing Corp.* v. *United States, supra,* slip op. 18.

Finally, unlike the situations in *Camara* and *See,* a warrant requirement would significantly impede the enforcement of the Occupational Safety and Health Act. This would be the case whether the warrant need

[16] If the employer questions the authority of the inspector, he may confirm the inspector's identify and authorization by means of a toll-free call. See p. 8, note 5, *supra*. Thus, there is no substantial threat of "criminal entry under the guise of official sanction" (*Camara* v. *Municipal Court, supra*, 387 U.S. at 531).

[17] Moreover, the scheduling of OSHA inspections is not a matter left to "the discretion of the enforcement officer in the field." *See, supra*, 387 U.S. at 545. Inspections are scheduled by the Secretary's Assistant Regional Directors and Area Directors pursuant to policy guidance set forth in Chapter IV of the Secretary's *Field Operations Manual* for the administration of the Act. See ICCH Employment Safety and Health Guide ¶ 4327.2 (1976) and p. 9, n. 7, *supra*.

be sought only after access is refused, as in *Camara,* or prior to any attempt to inspect. As this Court noted in *See* v. *City of Seattle, supra,* 387 U.S. at 545 n. 6, "surprise may often be a crucial aspect of routine inspections of business establishments." [18] Here, by prohibiting advance notice of inspections, Congress recognized that any significant delay once the inspector arrived would seriously lessen the effectiveness of the inspection system.[19]

[18] Because of the potential importance of the element of surprise, the Court in *See* left open the question whether warrants to inspect business premises may be issued only after access is refused. With respect to business premises, the Court stated that "the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes" (387 U.S. at 545 n. 6).

[19] Representative Steiger, the co-sponsor of the Act, recently described the problems that would ensue if a warrant requirement were imposed on OSHA inspections. He stated (123 Cong. Rec. H163 to H164 (daily ed., January 6, 1977)): "* * * [I]t is of course true that any order restricting OSHA's ability to inspect harms safety and health enforcement, since the right to make unannounced inspections is the cornerstone of the act.

* * * * *

"* * * [W]arrantless civil inspections are both absolutely essential to this act's enforcement and a longstanding Federal practice.

"* * * And the fact remains that any requirement which would permit employers to turn inspectors away during lengthy warrant proceedings, thus securing time to temporarily conceal or "clean up" safety and health hazards, would make this carefully-considered scheme virtually powerless to reach many injurious working conditions.

"This is especially true because the effect of any employer's insistence on a warrant would rapidly multiply, since his competitors would also be forced to refuse to permit inspections. Otherwise they would be saddled with safety costs their competition could easily evade.

"* * * If Congress cannot regulate safety and health without such restrictions, it cannot really regulate at all."

If an employer could nonetheless gain delay by refusing to permit an inspection without a warrant, his refusal would provide him with the functional equivalent of advance notice. As a result, he often could easily conceal hazardous working conditions during the interval between refusal and issuance of the warrant.[20]

[20] For example, employers who have permitted spray-booth ventilating fans designed to remove toxic and flammable substances to become clogged with residues may swiftly restore them to operating condition before allowing them to deteriorate again after inspection. Cf. 29 C.F.R. 1910.107. Employers who have allowed employees to work in unshored trenches, 29 C.F.R. 1926.652(a) and (b), or without protective hard hats, safety belts, respirators, ear plugs, guard rails, or foot protection, 29 C.F.R. 1910.23, 1910.95(b)(1), 1910.132–1910.136; 29 C.F.R. 1926.28(a), 1926.104–1926.105, 1926.500, may quickly require use of such equipment; then rescind or ignore such orders to reduce expenses or increase production, Cf., *e.g., I.T.O. Corp. of New England* v. *Occupational Safety and Health Review Commission*, 540 F. 2d 543 (C.A. 1); *C. N. Flagg & Co.*, OSHRC No. 1734, 11 OSHARC Rep. 632, affirmed without opinion, 538 F. 2d 308 (C.A. 2). Guards to prevent amputations from work with hazardous machines, *e.g.*, 29 C.F.R. 1910.212, 1910.217, may be turned off or by-passed by individual operators—a common production practice noted in the legislative history itself. See *e.g.*, Leg. Hist. 401–402 (Sen. Saxbe). And since proof of correctable violations *inter alia* requires a showing that workers had access to hazardous machines or areas, *e.g.*, *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263–1266 (C.A. 4), on remand, 1975–1976 CCH OSHD ¶ 20,448 (decided February 20, 1976) (not yet officially reported), successful enforcement proceedings may be blocked with relative ease by temporarily disconnecting machines or barricading such areas, if advance notice of an inspector's arrival is obtained.

The fact that current agency regulations (29 C.F.R. 1903.4) provide that the Secretary will, as a matter of self-restraint, obtain a court order if the inspector is initially refused entry does

(Continued)

The alternative of routinely obtaining an *ex parte* warrant before attempting an inspection would also create substantial difficulties for enforcement of the Act. Until the decision below, most employers willingly consented to inspections without a warrant. The Act covers nearly 65 million workers engaged in their respective labor in approximately five million workplaces,[21] and the Secretary is currently conducting more than 80,000 inspections yearly with only 1,300 inspectors.[22] In these circumstances, requiring inspectors to obtain a warrant before each inspection would

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not detract from our argument that a warrant requirement would interfere with the administration of the Act. Given the broad reach of the statute, there is no meritorious ground upon which an employer can refuse entry to the inspector. See *Matter of Restland Memorial Park*, 540 F. 2d 626 (C.A. 3) (business not entitled to judicial determination whether it is an employer "affecting commerce" prior to OSHA inspection). While an employer may, under the Secretary's regulations, claim an alleged right to refuse entry to an inspector and thereby put him to the burden of seeking a court order to enforce his statutory right of entry, a decision by this Court that no warrant is required would presumably reduce an employer's incentive to do so.

[21] See the President's Report to the Congress on Occupational Safety and Health for 1973, pp. 57–60 (1975). There have been approximately 400,000 inspections conducted since the effective date of the Act in April 1971. However, we are advised by the Department of Labor that many of these inspections were follow-up visits to confirm abatement of previously-cited hazards. See, *e.g.*, 29 U.S.C. 659(b). Thus, the Secretary has in fact inspected far fewer than 400,000 workplaces.

[22] Congress repeatedly stated its awareness that inspectors qualified to enforce the Act would be in critically short supply for an indefinite time. *E.g.*, S. Rep. No. 91–1282, *supra*, at 12, 21–22, Leg. Hist. 152, 161–162; H.R. Rep. No. 91–1291, *supra*, at 22–31, Leg. Hist. 852–861; H.R. Conf. Rep. No. 91–1765, 91st Cong., 2d Sess. 37 (1970), Leg. Hist. 1190.

place an unwarranted burden on limited judicial and enforcement resources, creating needless delays in implementing inspections, to the detriment of the Act's basic purpose of assuring the swiftest possible abatement of occupational hazards. See *Brennan* v. *Winters Battery Mfg. Co.*, 531 F.2d 317, 322–323 (C.A. 6), certiorari denied *sub nom. Winters Battery Mfg. Co.* v. *Usery*, 425 U.S. 991. Cf. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission, supra,* slip op. 12; *National Independent Coal Operators' Association* v. *Kleppe, supra,* 423 U.S. at 401.

3. In light of the above, this case is not controlled by *Camara* or *See*. Instead, it is governed by the analysis of *United States* v. *Biswell, supra*. There, the Court held that a warrantless search of a locked commercial storeroom as part of a federal gun control program authorized by 18 U.S.C. 923(g), which resulted in the seizure of unlicensed firearms from a gun dealer, did not violate the Fourth Amendment. While federal regulation of firearms was not deeply rooted as a historical matter, the Court sustained the limited warrantless inspection program challenged in that case because of the program's importance in the prevention of violent crime, the fact that a warrant requirement would have impeded enforcement in light of the ease with which statutory violations could be concealed, and the limited nature of the inspection's interference with the gun dealer's right to privacy. 406 U.S. at 315–316. Here, as in *Biswell,* because "[l]arge interests are at stake" (see pp. 4–5, note 2, *supra*), Congress has adopted "a regulatory inspection

system of business premises that is carefully limited in time, place, and scope," to be conducted pursuant to "the authority of a valid statute" (406 U.S. at 315).

Colonnade Catering Corp. v. *United States,* 397 U.S. 72, also supports our position here. In that case, the Court considered the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant and without the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. After reviewing the history of federal control in the area of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" (*id.* at 76). Thus, the Court unanimously ruled that the Fourth Amendment did not bar warrantless inspections to enforce the liquor laws and that Congress could have authorized their execution by means of forcible entry. However, it held that the particular inspection was beyond the scope of the statute because Congress had not expressly provided for forcible entry in the absence of a warrant but had instead given the government agents a remedy by making it a criminal offense under 26 U.S.C. 7342 to refuse admission to the inspectors.

We do not quarrel with the district court's observation (J.S. App. A 7a) that *Biswell* and *Colonnade Catering* turn in part on the fact that firearms

and liquor dealers have been subjected to a detailed system of governmental regulation and that those cases respectively dealt with a "pervasively regulated business" (406 U.S. at 316) and an "industry long subject to close supervision and inspection" (397 U.S. at 77). But here, too, Congress has directed that all businesses affecting interstate commerce comply with uniform safety and health standards established by the Secretary and stand ready to submit "without delay" to inspection of the working conditions of their employees. Indeed, the Occupational Safety and Health Act of 1970 is not the first congressional regulation of employee safety and health in industry as a whole rather than in particular types of businesses. It is but the most recent expression of congressional concern that began with the Walsh-Healey Act of 1936, 49 Stat. 2036, as amended, 41 U.S.C. 35 *et seq.* Thus, at least two generations of employers have been subjected to extensive federal regulation of employee safety and health.[23] The limited intrusion

[23] The legislative history of the Occupational Safety and Health Act of 1970 shows that Congress was well aware of the long history of federal and state regulation. See, *e.g.*, 29 U.S.C. 653(b)(2), 667; S. Rep. No. 91-1282, 91st Cong. 2d Sess. 4, 10-13, 18 (1970), Leg. Hist. 144, 150-153, 158; H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 15, 21, 25 (1970), Leg. Hist. 845, 851, 855; *id.* at 58-59, Leg. Hist. 888-889 (minority views). See also *Associated Industries of New York State* v. *Department of Labor*, 487 F. 2d 342, 351-353 and nn. 11, 13-14 (C.A. 2). Indeed, the Act directs the Secretary to reissue pre-existing safety and health standards without notice or hearing because they had previously been widely distributed and industry was already familiar with them. See 29 U.S.C. 651 (9) and (10), 653(b)(2), 655(a); Leg. Hist. 145-146, 846-847.

here into appellee's privacy was therefore based upon longstanding regulation in the limited sphere of employee safety and health and not simply upon appellee's generalized status as a business establishment. Cf. *G.M. Leasing Corp.* v. *United States, supra,* slip op. 15; *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 280–281 (Powell, J., concurring).

Moreover, as in *Biswell,* the statute at issue here provides procedural safeguards that limit the discretion of the inspector. As we have described *supra,* p. 8, the inspector is required to present identifying credentials and make an opening explanation of his mission to the employer, who is permitted to make a toll-free telephone call to verify the identify of the inspector. As a result, "the visible manifestations of the field officers' authority at * * * [an employee workplace] provide substantially the same assurances * * * [as a warrant]." *United States* v. *Martinez-Fuerte, supra,* 428 U.S. at 565. Moreover, the employer is entitled to accompany the inspector on his tour of the premises, which is limited to employee work areas. Thus, the employer is "not left to wonder about the purposes of the inspector or the limits of his task" (*United States* v. *Biswell, supra,* 406 U.S. at 316). Indeed, the limited discretion of the inspector is further shown by the fact that the selection of inspection sites is made by departmental area supervisors applying published criteria.[24] The workplaces to be inspected are "not chosen by officers in the

[24] See p. 37, note 17, *supra.*

field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources" (*United States* v. *Martinez-Fuerte, supra,* 428 U.S. at 559). Thus, the "warrant requirement in *Camara* [which] served specific Fourth Amendment interests * * * would make little contribution" with respect to inspections under the Act (*id.* at 565).

Finally, the decision in *Biswell* reflects the Court's recognition that the gun inspection powers there at issue were necessary to implement a regulatory system of great importance to society. Here, Congress has similarly determined that the safety of the Nation's workers is of great societal importance. As we have pointed out *supra,* pp. 19–22, if the Occupational Safety and Health Act is to be an effective means of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651), unannounced inspections are essential to the statutory scheme. Cf. *Nixon* v. *Administrator of General Services,* No. 75–1605, decided June 28, 1977, slip op. 30 and n. 21. While the Court in *Biswell* characterized the inspection in *See* as designed to discover "conditions that were relatively difficult to conceal or to correct in a short [period] of time" (406 U.S. at 316), here, as in *Biswell,* the object of the inspector's mission is easily concealed. Thus, "the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be

preserved, the protections afforded by a warrant would be negligible" (*ibid.*). Thus, the Court in *Biswell* had "little difficulty in concluding that where * * * regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute" (*id.* at 317).

In sum, virtually all of the ingredients that the Court has found significant in concluding that statutorily authorized inspections may be conducted without a warrant—express congressional authorization (see, *e.g., United States* v. *Watson,* 423 U.S. 411), compelling governmental need in the light of the particular purpose of the inspection involved, the unsuitability of the subject matter for the making of a meaningful "cause" determination, and limited interference with legitimate privacy expectations—are present in this case. *Biswell* accordingly supports the validity of the warrantless inspections under the Occupational Safety and Health Act. Accord: *Brennan* v. *Buckeye Industries, Inc.,* 374 F. Supp. 1350 (S.D. Ga.); *Dunlop* v. *Able Contractors,* D. Mont., Civ. No. 75-57-BLG, decided December 15, 1975, appeal pending, C.A. 9, No. 76-1615; *Usery* v. *Northwest Orient Airlines,* E.D. N.Y. No. 76-C-2177, decided June 10, 1977. Contra, *Brennan* v. *Gibson's Products, Inc. of Plano,* 407 F. Supp, 154, 162-163 (E.D. Tex.) (three-judge court), appeal pending, C.A. 5, No. 76-1526; *Dunlop* v. *Hertzler Enterprises, Inc.,* 418 F. Supp. 627 (D. N. Mex.) (three-judge court), appeal pending, C.A. 10, No. 76-2020; *Usery* v. *Rupp Forge Co.,* N.D. Ohio, No. C-76-385, decided April 22, 1976, appeal pending, C.A. 6, No. 76-1960; *Usery* v. *Centrif-Air Machine Co.,* 424 F. Supp. 959 (N.D. Ga.), appeal pending, C.A. 5, No. 77-1511.

C. A large number of federal regulatory statutes validly provide for similar warrantless inspections of business premises

Although the decision of the district court deals only with the inspection provisions of Section 8(a) of the Occupational Safety and Health Act of 1970, its holding that *Camara* and *See* require OSHA inspectors to obtain a warrant to enter the premises of business establishments would arguably be applicable to a host of comparable federal regulatory statutes providing for warrantless inspections to enforce congressionally mandated standards for safety and health. For example, inspectors of the Food and Drug Administration are authorized "to enter, at reasonable times, any factory * * * in which food, drugs, devices, or cosmetics are manufactured * * * and * * * to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory * * *" (21 U.S.C. 374 (a)). As in the case of the Occupational Safety and Health Act, the efficacy of the Food, Drug and Cosmetic Act depends upon the Food and Drug Administration's ability to make unannounced random inspections. Accordingly, in the only decided cases to

date, the constitutionality of such warrantless inspections under the Food, Drug and Cosmetic Act have been upheld. See *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla.); *United States* v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1376–1377 and nn. 12–15 (D. Del.); *United States* v. *Litvin*, 353 F. Supp. 1333 (D. D.C.). Accord: *Youghiogheny and Ohio Coal Co.* v. *Morton, supra* (Coal Mine Health and Safety Act of 1969); *United States ex rel. Terraciano* v. *Montanye, supra*, 493 F. 2d at 684–685 (state narcotics statute); *United States* v. *Western & A. R.R.*, 297 Fed. 482, 484–485 (N.D. Ga.) (Railway Safety Appliance Act).

These decisions have accepted our submission, as finally articulated by this Court in *Colonnade Catering* and *Biswell*, that Congress is fully empowered to authorize limited warrantless inspections as part of a regulatory system as long as they do not intrude upon legitimate privacy expectations and where the antecedent evaluation of a magistrate would not afford meaningful protection. Indeed, Congress authorized such warrantless inspections at least as early as Section 6 of the Railway Safety Appliance Act of 1908, 36 Stat. 915, as amended, 45 U.S.C. 29, which provides that "[e]ach inspector shall make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to fully carry out the provisions of * * * this title * * *." It is difficult to believe that Congress [25] and the states [26] during

[25] Similar or identical provisions are included in many federal statutes. See, *e.g.*, 7 U.S.C. (Supp. V) 136g (Environmental Pesticide Control Act); 7 U.S.C. 2146(a) (Animal Welfare Act of 1970); 8 U.S.C. 1225(a) (Immigration and Nationality Act); 15 U.S.C. 1270 (inspection of any factory or warehouse for "hazardous substances" by Secretary of Health, Education and Welfare); 15 U.S.C. (Supp. V) 1401(a)(2) (National Traffic and Motor Vehicle Safety Act); Pub. L. 94–469, Section 2, 90 Stat. 2003, (Toxic Substances Control Act); 21 U.S.C. 603 (Secretary of Agriculture's inspection of meat and meat products); 21 U.S.C. 1034(a), (b), (d) (Egg Products Inspection Act); 26 U.S.C. 5146(b) (Internal Revenue Code of 1954); 26 U.S.C. 7606 (Internal Revenue Code of 1954); 29 U.S.C. 211(a) (Fair Labor Standards Act); 30 U.S.C. 723, 724 (Metal and Nonmetallic Mine Safety Act); 30 U.S.C. 813 (Coal Mine Health and Safety Act); 33 U.S.C. (Supp. V) 467(a) (Water Pollution Control Act); 41 U.S.C. 38 (Walsh-Healey Act); 41 U.S.C. 53 (Anti-Kickback Act); 42 U.S.C. 262(c) (Public Health Service Act; 42 U.S.C. 263i (Clinical Laboratories Improvement Act); 42 U.S.C. 1857c–9 (Clean Air Act); 42 U.S.C. 1857f–6 (Air Pollution Control Act); 42 U.S.C. 2035(c), 2051 (Atomic Energy Act); 42 U.S.C. (Supp. V) 5413(a) and (b) (National Mobile Home Construction and Safety Standards Act of 1974); Section 3007, as added, Pub. L. 94–580, 90 Stat. 2810 (Solid Waste Disposal Act); 45 U.S.C. 437(c) (Railroad Safety Act); 46 U.S.C. 239, 362, 404 (Bureau of Marine Inspection Act); 46 U.S.C. 408 (Coast Guard inspection of vessel boiler plates at manufacturer's plant); 49 U.S.C. 1425(b) (Federal Aviation Act); 49 U.S.C. 1677(a)(3), 1681(b) (Natural Gas Pipeline Safety Act); 49 U.S.C. (Supp. V) 1808(c) (Transportation Safety Act of 1974). See also *Colonnade Catering Corp.* v. *United States*, 410 F. 2d 197, 204 n. 6 (C.A. 2), reversed on another ground, 397 U.S. 72.

[26] Numerous state occupational safety and health statutes have similar warrantless inspection provisions, See, *e.g.*, Alas. Stats., § 18.60.083 (1974); Ariz. Rev. Stat. Ann., § 23–408 (1971); Cal. Labor Code, § 6314(a) (West 1976); Colo. Rev. Stat., § 8–11–106 (1974); Ill. Ann. Stat., c. 48, § 59.2(b) (1) and (2) (1969); Ind. Stats. Ann., § 22–8–1.1–23.1 (1974); Md. Ann. Code, Art 89, § 35 (a) (1976); Minn. Stat. Ann., § 182.659, Subd. 1 (1966); Mont. Rev. Code, § 4213 (1) and (2) (1961); Nev. Rev. Stat., § 618.225

the last 70 years would have enacted such a large number of regulatory statutes providing for warrantless inspections if the rule were understood to be otherwise or even subject to substantial uncertainty. The district court's departure from this settled understanding and practice under the Fourth Amendment calls for reversal by this Court.

II. EVEN IF A WARRANT IS REQUIRED, THE DISTRICT COURT SHOULD HAVE UPHELD THE CONSTITUTIONALITY OF THE ACT

Even if, despite our contrary submission, this Court should conclude that the Fourth Amendment precludes warrantless safety inspections of comprehensively regulated working areas, the district court erred in declaring 29 U.S.C. 657(a) "unconstitutional and void" and enjoining the Secretary from "acting

(1975); N. Mex. Stat. Ann., § 59-14-9 (1974); N. C. General Stats., §§ 95-133, 95-136 (1975); Ore. Rev. Stat., § 654.067 (1975); Tenn. Code Ann., § 50-520 (1976); Vt. Stats. Ann., Tit. 21, § 206 (1971); Va. Code, §§ 40.1-6, 40.1-10 (1976); Wisc. Stats. Ann., § 101.02(15(g) (1973).

Eleven states (Kentucky, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia, and Wyoming) have filed a brief *amici curiae* in this case urging reversal of the district court.

Maryland, Oregon, and Alaska statutes analogous to the Act's inspection provisions have been held unconstitutional by state courts relying upon *Brennan* v. *Gibson's Products Inc. of Plano*, 407 F. Supp. 154 (E.D. Tex.). See *Epstein* v. *Fitzwater*, No. 6838EQ, decided September 2, 1976 (Cir. Ct. Garrett County, Md.); *Oregon* v. *Keith R. Foster, dba Keith Mfg. Co.*, Civ. No. 5943, decided November 1, 1976 (Cir. Ct. Jefferson County, Ore.); *Alaska* v. *Alaska Truss & Millwork*, No. 2903, decided June 2, 1977 (Alaska S. Ct.).

or attempting to act pursuant to or in furtherance of" that Section (J.S. App. A 11a-12a). It should instead have followed this Court's rule that "under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment," *Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 272, and interpreted the statute to meet Fourth Amendment requirements. See also *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (Brandeis, J., concurring).[27] That course has been consistently followed by the Court with respect to administrative inspections, for it did not invalidate the ordinances in *Camara* and *See* or the statute in *Almeida-Sanchez.* It is also the course followed by all other district courts that have found warrantless OSHA inspections impermissible. See pp. 46-47, *supra.*

Although we believe that Congress intended to authorize warrantless inspections, it is equally clear that interpreting the statute to meet Fourth Amendment requirements would more closely approximate congressional intent than totally eliminating the authority to inspect. 29 U.S.C. 677; cf. *Tilton* v. *Richardson,* 403 U.S. 672, 684. Indeed, Representative Steiger, the author of the version of Section 8(a) of

[27] In light of *Camara* v. *Municipal Court*, 387 U.S. 523, any warrant requirement read into the inspection provisions of the Act "will not necessarily depend upon specific knowledge * * * of the particular * * * [workplace]" (*id* at 538), as in a search pursuant to a criminal investigation. Instead, the Secretary's showing that the location apparently houses a covered employee workplace should suffice to obtain a warrant under the *Camara* standard.

the Act which ultimately prevailed in conference, stated that while prompt unannounced inspections are essential to the Act's enforcement, they were meant to be carried out "in accordance with applicable constitutional protections." Leg. Hist. 1077. That explicit expression of congressional intent requires that the constitutionality of the Act be upheld.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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